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In The

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON;
CITY OF AUBURN, WASHINGTON;
AND CITY OF DES MOINES, WASHINGTON,

Petitioners,

v.

QWEST CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE LOCAL GOVERNMENTS IN SUPPORT OF PETITIONERS

[Amici Listed On Inside Cover]

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STATEMENT OF INTEREST

Amici curiae are municipal and county governments, officials, and organizations throughout the United States.[1] We have a direct interest in this case because if the decision below is allowed to stand, it may significantly erode our traditional police power authority to regulate the use of public streets and to obtain fair compensation for the use of public property. Amici urge the Court to grant the petition for writ of certiorari and to reverse the judgment below.

Amici curiae include national organizations representing the interests of local governments. The National League of Cities, which represents more than 18,000 communities, is the oldest and largest national organization representing municipal governments. The International Municipal Lawyers Association has been an advocate and resource for local government attorneys in the United States and Canada since 1935. The National Association of Telecommunications Officers and Advisors has represented the telecommunications needs and interests of local governments for over 20 years. The Alliance for Community Media, with more than 1,000 members, supports legislation and regulation that advance community access to electronic media. The Texas Coalition of Cities for Utility Issues represents 110 communities and the Greater Metro Telecommunications Consortium represents Denver, Colorado and 28 neighboring communities.

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[1] In accordance with Rule 37.6, amici curiae state that no counsel for a party authored a brief in whole or in part, and no person or entity other than amici curiae, their counsel and members made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties, and letters of consent are being filed under Rule 37.2.

Amici also include approximately 30 individual cities and counties from thirteen states.

Congress enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Telecommunications Act) to promote competition in the delivery of telecommunications services. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Since its enactment, local governments have experienced a dramatic increase in the number of entities disrupting public streets by installing telecommunications facilities. The construction and maintenance of these facilities create significant stresses on local infrastructure such as roads, surface and underground public transportation facilities, sewer and water facilities, and gas, electric and other utility facilities. The increased density of facilities and construction activity disrupts individuals and businesses and increases public safety risks. The increased activity also increases stress on local government budgets. In response, many local governments have adopted measures to regulate and coordinate the use of public streets by telecommunications companies and others.

The Ninth Circuit's decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), Petitioners' Appendix (Pet. App.) 1a-36a, casts a shadow over these local efforts. The *Auburn* court struck down several local ordinances that were intended to manage public rights-of-way. Yet the decision below provides no clear guidance about how local governments may lawfully manage the demands on streets created by telecommunications competition. As a result, citing *Auburn*, Qwest and other companies are now asserting that a wide range of local regulations are preempted by section 253 of the Telecommunications Act. Local governments are being forced to spend vast amounts of time and money debating and

litigating the scope of their authority to protect the public interest through management of public streets. These costs are ultimately paid by local taxpayers.

Amici agree with petitioners that the Ninth Circuit's construction of section 253 conflicts with the Supreme Court's construction of similar statutory language in *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 389-90, and with interpretations of section 253 from the Eleventh Circuit, the Sixth Circuit, and the FCC. *See BellSouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); Federal Communications Commission (FCC) *Public Notice*, "Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act," FCC 98-295 (rel. Nov. 17, 1998).[2] We write separately to emphasize that the *Auburn* decision has generated much heat but little light on an issue of extraordinary importance – the degree to which the Telecommunications Act affects local authority. We urge the court to grant the petition for a writ of certiorari to resolve the current confusion.

STATEMENT OF THE CASE

Congress intended the Telecommunications Act to enhance opportunities for competition among providers of telecommunications services. At the same time, Congress recognized that its "procompetitive, deregulatory" goals[3] had to be balanced against other important interests that might not be well-served by a deregulated

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[2] The FCC guidelines are available at <http://www.fcc.gov.Bureaus /Common___Carrier/PublicNotices/1998/fcc98295.txt.

[3] S. Conf. Rep. No. 104-230, at 1, 104th Cong. (2d Sess. 1996).

market. These include preserving universal service, protecting public safety and welfare, ensuring service quality, safeguarding consumer interests, and effectively managing public rights-of-way.

To serve these competing goals, section 253(a) of the Act preempts state and local laws that "prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications services.[4] But the Act also establishes two safe harbors for state and local actions: section 253(b) protects provisions aimed at promoting the public health, safety and welfare and section 253(c) protects provisions for managing rights-of-way and fair and reasonable compensation requirements for use and occupancy of the rights-of-way.

In *City of Auburn v. Qwest Corp.*, Pet. App. 1a-36a, the Ninth Circuit held that the challenged municipal ordinances violated section 253 as a matter of law. The court found that section 253(a) broadly restricts local regulations on telecommunications carriers and that, "[t]he preemption is virtually absolute. . . . " Pet. App. 24a.

The Ninth Circuit initially concluded that *each* of the following requirements (among others) *individually* has the effect of prohibiting service: (1) requiring companies to submit "lengthy and detailed" franchise applications, including information about legal, technical or financial qualifications, (2) requiring application fees ranging from an undetermined amount up to $5,000, (3) requiring a

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[4] The distinction between a prohibition and an effective prohibition relates only to how the result is accomplished and is not at issue in this case. A requirement that has the "effect of prohibiting" is a prohibition accomplished by indirect means or cumulative action, rather than a single legislative act. *See AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). Only alleged effective prohibitions are at issue here.

public hearing before granting a franchise, (4) requiring companies to report on transfers of ownership shares, (5) retaining the authority to impose civil or criminal penalties for violations of city or state law, and (6) reserving discretion to grant, deny, or revoke the franchises. *City of Auburn v. Qwest Corp.*, 247 F.3d 966, 981, *amended and superseded by* 260 F.3d 1160 (9th Cir. 2001).

On rehearing, the court amended its decision to provide that the municipal requirements *"in combination,* have the effect of prohibiting the provision of telecommunications services." Pet. App. 25a-26a (emphasis added). The court further modified its decision to note that its conclusion as to local authority to deny a franchise application "is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone." Pet. App. 27a n.11. Thus, upon rehearing, the court left local governments and telecommunications service providers without clear direction as to whether any particular provision by itself, or whether some combination of provisions, effectively prohibits service. Furthermore, the court did not explain why or how any of the requirements either individually or collectively necessarily had the effect of prohibiting service.

The court recognized that local requirements that have the effect of prohibiting service are not preempted if they constitute management of public rights-of-way. Pet. App. 27a. The court, however, interpreted the preservation of local authority in section 253(c) as a narrow exception to the general preemption set forth in section 253(a). Pet. App. 14a; 27a. The court concluded that section 253(c) offers a safe harbor only for regulations that represent "control over the right-of-way itself, not control over the companies with facilities in the right-of-way." Pet. App. 28a. It identified four aspects of the ordinances that,

it found, did not directly relate to management of the rights-of-way: (1) requiring "an extensive application process," including data to determine "the financial soundness, technical qualifications, and legal ability to provide telecommunications services," (2) imposing reporting requirements, including information about ownership and the transfer of ownership shares of the telecommunications company, (3) imposing certain conditions related to rates, terms, and conditions of service or requiring companies to provide excess capacity for use by cities or other users, and (4) retaining discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise on the basis of unnamed factors." Pet. App. 29a-32a. The court did not provide any statutory support for its interpretation that section 253(c) is limited to regulations that *directly* affect public rights-of-way, nor did it set forth any principles for distinguishing between right-of-way regulations and regulation of companies with facilities located in the rights-of-way.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve the conflicts identified in the petition between the Ninth Circuit's decision and decisions by the Supreme Court, the Eleventh Circuit and the Sixth Circuit, and to determine the preemptive scope of section 253.

In addition, amici believe that the sheer volume of legal errors in the Court of Appeals decision, combined with the powerful and widespread impact these errors are having on local communities, enhance the need for Supreme Court review. In addition to its erroneous conclusions on the merits, the *Auburn* decision reflects numerous errors that, taken together, have the effect of *reversing* the required judicial presumption *against* preemption. Among the most egregious of these errors:

- The Ninth Circuit did not construe the term "prohibition" in a manner consistent with its plain meaning. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (term not defined in a statute must be construed "in accordance with its ordinary and natural meaning"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (the question of preemption begins with "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (internal citation omitted).
- The Ninth Circuit failed to apply the proper standard for reviewing a facial preemption challenge. The burden on a plaintiff making a facial challenge is heavy. Accordingly, the court should have presumed that the cities would exercise the discretion reserved to them by the challenged ordinances in a manner consistent with federal law. *See, e.g., California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588-89 (1987) (if any potential set of permit conditions would withstand a preemption challenge, facial claim is defeated); *Reno v. Flores*, 507 U.S. 292, 300-01 (1993) (in facial challenge, plaintiff must establish that no circumstances exist under which law would be valid). The Ninth Circuit instead presumed that the cities would abuse their discretion.
- As detailed in the petition, the Ninth Circuit misapplied the standard for judgment on the pleadings set forth in Federal Rule of Civil Procedure 12(c). *National Metro. Bank v. U.S.*, 323 U.S. 454, 456-57 (1945) (where plaintiff moves for judgment on the pleadings, all allegations in defendant's response must be treated as established).

Qwest and other carriers are relying on these errors to assert sweeping challenges to local requirements across

the nation.[5] In the face of these challenges, local governments have two possible responses: engage in prolonged negotiations or litigation to enforce local laws, or refrain from adopting or enforcing regulations on right-of-way use that local officials believe are both consistent with the Telecommunications Act and *necessary* to protect the government, other rights-of-way users, and the public.

The Court should grant the writ to resolve conflicts as to how local governments' traditional police powers may be affected by section 253.

I. THE NINTH CIRCUIT'S HOLDING THAT THE CHALLENGED ORDINANCES EFFECTIVELY PROHIBITED TELECOMMUNICATIONS SERVICES AS A MATTER OF LAW CONFLICTS WITH THIS COURT'S DECISIONS UPHOLDING PRINCIPLES OF FEDERALISM.

Where federal law steps into an area of traditional state or local regulation, courts apply a presumption against preemption. *DeBuono v. NYSA-ILA Med. and Clinical Serv.*, 520 U.S. 806, 814 and n.8 (1997). This Court has repeatedly held that the presumption against preemption requires the scope of preemption to be construed narrowly, even where, as here, it is explicit in the statute. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (court must start with assumption that Congress will not cavalierly preempt state law). *See also Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992) (the presumption "reinforces the

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[5] While amici reserve their right to contest these challenges, because many communities lack the resources to do so, for purposes of this brief we adopt the broad reading Qwest and other carriers ascribe to *Auburn*.

appropriateness of a narrow reading" of express preemption). Regulating entities that use public rights-of-way is an area of traditional state regulation. *Atchison, T. & S.F.R. Co. v. Public Util. Comm'n*, 346 U.S. 346, 355 (1953) ("construction and use of public streets is a matter peculiarly of local concern").

The Ninth Circuit turned preemption analysis on its head. First, the court purported to acknowledge that only requirements that have the effect of prohibiting service are preempted, but its application of this limiting principle in fact imposed no limit at all. Indeed, the lack of substantive analysis as to what constitutes a prohibition reveals the court's assumption that virtually any inconvenience to telecommunications providers constitutes an effective prohibition. As a result, the court stated summarily that section 253(a)'s preemption "is *virtually absolute* . . . " and that it creates "a broad prohibition against state and local regulation. . . . " Pet. App. 24a, 14a (emphasis added).

Second, while the structure of the decision appears to reflect that the sole purpose of subsection (c) is to preserve local authority to manage and obtain compensation for use of the public rights-of-way, the court in practice applied subsection (c) as if it set forth the outer limits on local authority over telecommunications providers. The court effectively held that all local requirements are preempted unless they are specifically preserved. Pet. App. 27a. Moreover, the Court held that local requirements directed at telecommunications providers could "violate" section 253(c) even though that provision *preserves* rather than limits local authority. Pet. App. 29a, 32a. The court failed to recognize that local right-of-way regulations are preserved *even if* they effectively prohibit service. The court also failed to recognize that local regulations that

do not constitute right-of-way management are *nonetheless preserved* unless they prohibit or effectively prohibit service.

Both of these interpretations are inconsistent with proper preemption analysis. State and local authority should be preserved in the absence of a clear contrary intent by Congress. This proper analysis is reflected in the decisions of other circuits that have interpreted section 253. *See BellSouth Telecomm. v. Town of Palm Beach*, 252 F.3d at 1176, 1187-89 (section 253(a) contains the only substantive limitations on state and local regulation of telecommunications, and sections (b) and (c) preserve rather than limit state and local authority); *TCG Detroit v. City of Dearborn*, 206 F.3d at 624 (obligation to obtain a franchise and pay franchise fees is not in itself an effective prohibition subject to preemption under section 253(a)).[6]

A. Preemption Under Section 253 Ordinarily Requires a Factual Inquiry.

The Ninth Circuit's conclusion that section 253 broadly preempts local regulation is largely based on its erroneous decision that preemption was properly decided as a matter of law under the circumstances presented by the challenged ordinances. The court cites only a single case for this proposition, *Industrial Truck Ass'n v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), Pet. App. 18a-19a. This case, which interprets the Occupational Safety and Health Act, provides no authority for how courts should analyze

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[6] Even a prior Ninth Circuit decision held that section 253 was "designed to prevent explicit prohibitions" and not to prevent all state and local regulation of telecommunications services. *Communications Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

the preemptive effect of section 253 for at least three reasons:

- There is no single answer to whether preemption is a question of law or requires factual analysis. This Court has found that factual development is necessary in some preemption contexts. *See, e.g., Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 511 (1984) (whether union dues collection ban is preempted by NLRA requires factual development).
- Unlike *Auburn, Industrial Truck* involved a form of preemption – "field preemption" – where state law "attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy." *Industrial Truck*, 125 F.3d at 1309. In such cases, the primary question – whether the challenged law addresses an issue or subject matter covered by the federal statutory scheme – can be determined based solely on the text of the challenged and allegedly preemptive laws.
- The cases cited in *Industrial Truck* are all cases involving ERISA – a statute containing "one of the broadest preemption clauses ever enacted. . . . " *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1501 (9th Cir. 1993) (internal citations omitted). Like OSHA preemption, the standard of review for ERISA preemption has little bearing on the meaning of the express preemption language in section 253.

Unlike both OSHA and ERISA, section 253 preemption depends, in the first instance, on the *effect* of the local measure, i.e., whether it has the effect of prohibiting the provision of service. It is difficult to imagine a more fact-based concept than "effect," the term Congress selected in section 253(a). Indeed, the FCC has interpreted the statute to require analysis of section 253 preemption "on a case-by-case basis . . . depending on the facts presented." *In the Matter of Section 257 Proceedings to Identify*

and Eliminate Market Entry Barriers for Small Businesses, 12 F.C.C.R. 16802, ¶107 (1997).

In concluding that preemption was properly decided as a matter of law, the Ninth Circuit reasoned that "there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity." Pet. 18a-19a. This reasoning frames the wrong question and reflects the court's inappropriate reliance on field preemption cases. In defining the scope of section 253 preemption in the context of a motion for judgment on the pleadings, the appropriate first question must be: Is there is a factual dispute about whether the challenged ordinances prohibit or have the effect of prohibiting telecommunications service?

While there might be extreme circumstances in which this question could be answered as a matter of law (where, for example, a city imposes preconditions on right-of-way use that only an incumbent telecommunications provider could satisfy), those cases will be the exception rather than the rule. Indeed, this Court has held that the question of whether regulations amount to a prohibition on service was not properly decided without development of a factual record. *Southern Pac. Co. v. City of Portland*, 227 U.S. 559, 573-74 (1913) (whether regulation amounted to a prohibition had to be decided on factual record). In most cases, finding that a local law has a prohibitive effect will require careful, factual inquiry into the actual or probable impact of the challenged requirements on telecommunications service providers.

B. Congress Intended the Preemptive Scope of Section 253 to be Narrow.

This Court should clarify that section 253(a) means what it says and does not give courts broad license to preempt state and local regulations. " '[T]he purpose of

Congress is the ultimate touchstone' in every pre-emption case." *Medtronic*, 518 U.S. at 485 (citations omitted). There is overwhelming evidence that Congress intended section 253(a) to preempt *narrowly*.

First, the plain language of section 253(c) preserves local authority to regulate and obtain compensation for use of public rights-of-way. Section 253(c) provides that "[n]othing in this section *affects* the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis. . . . " 47 U.S.C. § 253(c) (emphasis added). Congress intended traditional local authority over public rights-of-way to remain undisturbed *even if it has a prohibitive effect*.

Second, the language of section 253(a) bars *only prohibitions and effective prohibitions*. In contrast, other provisions of the Telecommunications Act preclude both prohibitions and other, less extreme, limitations or conditions. *See, e.g.*, 47 U.S.C. §§ 251(b)(1) and (c)(4)(B) (local exchange carriers may not prohibit or "impose unreasonable or discriminatory conditions or limitations on" certain activities) and § 541(b)(3)(B) (franchising authorities may not impose requirements that have "the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator . . . "). *See also* 47 U.S.C. § 257 (requiring the Federal Communications Commission to eliminate "barriers" to market entry); § 251(d)(3)(C) (preserving state regulations that do not "substantially prevent implementation" of purposes of section 251).

Third, Congress requires that section 253 be narrowly construed by providing that the 1996 amendments to the

Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided. . . . " 47 U.S.C. § 152nt(c)(1).

Finally, the legislative history confirms that while Congress intended to eliminate restrictions that would prevent competitors from entering the telecommunications market, Congress did not intend to eliminate all costs or burdens on carriers that might result from state or local regulation. *See* H.R. Conf. Rep. No. 458 (2d Sess. 1996) (explaining that, under section 253(b), state laws or regulations that condition telecommunications activities to protect ratepayers from harm are not preempted, but explicit prohibitions on entry are). Congress considered and rejected language that would have significantly constrained local authority. *See* H.R. 1555, introduced May 3, 1995 (proposed section 243), which would have preempted all state and local requirements not expressly preserved.

In sum, if Congress had intended broadly to preempt local regulations affecting telecommunications providers, it would have done so expressly.

II. THE LACK OF CLARITY AS TO LOCAL AUTHORITY UNDER SECTION 253 IS CREATING CONFLICTS ACROSS THE COUNTRY AND IMPAIRING LOCAL GOVERNMENTS' ABILITY TO MANAGE PUBLIC RIGHTS-OF-WAY.

A. The Ninth Circuit Decision Creates Confusion for Local Governments that Seek to Regulate Public Rights-of-Way.

Initially, the Ninth Circuit held that a variety of requirements *individually* constituted effective prohibitions on service. *Auburn*, 247 F.3d at 981. Under that decision, public hearing requirements, franchise application fees, ownership transfer reporting requirements,

excess conduit requirements, detailed information requirements, retaining discretion to grant, deny, or revoke a franchise and the possible imposition of civil or criminal penalties, each would have constituted effective prohibitions. On rehearing, perhaps in recognition that its initial conclusion was unsustainably overbroad, the court held that the Washington ordinances "include several features that, *in combination*, have the effect of prohibiting the provision of telecommunications services." Pet. App. 25a-26a (emphasis added).

Unfortunately, the court's rehearing decision did not offer greater clarity or rationale for determining what constitutes an effective prohibition under section 253(a). In both its initial and rehearing decisions, the court failed to apply the ordinary and plain meaning of the term "prohibit," which is defined as "to forbid by authority" or "to prevent from doing something." *Webster's New Collegiate Dictionary* 940 (9th ed. 1990). Moreover, the lack of clarity in the court's rehearing decision gives carriers a foothold to challenge – and force local governments to defend – each and every one of the individual requirements at issue in *Auburn*.

Similarly, the Ninth Circuit stated that "right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way." Pet. App. 28a.[7] The court's purported distinction between regulation of public streets and regulation of entities that use public streets is not viable. Indeed, this

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[7] The court's reliance for this distinction on the FCC's decision in *In re TCI Cablevision of Oakland County, Inc.* (Pet. App. 28a) is without any force. The FCC expressly stated that it was *not* resolving any section 253 claim or drawing any conclusions about the scope of power reserved to local governments by section 253(c). *See In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶7 (1997).

Court has recognized that the power to regulate public rights-of-way is broad, and includes the power to prescribe the terms and conditions upon which the streets may be used. *City of St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 469-70 (1893) (power to require payment for exclusive use of portion of streets is within power to regulate street use). *See also Southern Pac. Co. v. City of Portland*, 227 U.S. at 571-72 (power to designate street on which railroad tracks could be located implicitly included authority to fix terms of use); *Hodge Drive-It-Yourself Co. v. City of Cincinnati*, 284 U.S. 335, 337 (1932) (imposing license fees and insurance requirements on companies that lease cars derives from city's power to prescribe terms on which businesses may use streets for gain).

B. The *Auburn* Decision is Proliferating Litigation and Impairing Local Governments' Ongoing Ability to Protect Users of Public Rights-of-Way.

The Ninth Circuit's decision creates confusion and increases litigation for local governments trying to adopt or enforce requirements for companies that use public rights-of-way to provide telecommunications services. Companies are taking advantage of the lack of analysis in the *Auburn* decision to challenge virtually every local condition or restriction on their use of rights-of-way. While amici reserve the right to dispute Qwest's broad reading of the Ninth Circuit's decision, that alone does not resolve the problems *Auburn* has created. The balance Congress struck in section 253 will be derailed if local governments are forced to spend substantial resources simply to defend requirements that they believe are necessary to protect public rights-of-way. At best, only those communities that can afford the time and money to defend fundamental and long-standing tools used to

manage use of public rights-of-way will retain the authority that Congress intended to preserve for all local governments.

For example, since the *Auburn* decision, Qwest sued Portland, Oregon rather than agree to renew its franchise on the same terms under which it had operated for many years. Qwest claims, among other things, that the city (1) could no longer charge fees for right-of-way use that exceed Portland's costs, and (2) may not impose penalties for violations of city or state law. *See Qwest Corp. v. City of Portland*, Memorandum in Support of Motion for Summary Judgment, No. CV 01-1005 JE at 10 (D. Or. filed July 20, 2001) ("Qwest Memorandum").

Challenges are occurring both within and outside of the Ninth Circuit. Even non-telecommunications carriers are challenging local requirements in the wake of *Auburn*. For example, a company that does not provide telecommunications services has sued San Francisco, California, alleging that the imposition of penalties for failing to comply with the terms and conditions of excavation permits violates section 253. *Underground Constr. Co., Inc. v. City and County of San Francisco*, No. C-01-03707 MMC (N.D. Cal. filed Oct. 1, 2001).

The following examples demonstrate the confusion generated by the Ninth Circuit's decision, and the threat it creates for the public safety and welfare.

1. The Ninth Circuit held that requiring companies to submit "a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items" and other information requested by the city, in combination with other requirements, effectively prohibits service. Pet. App. 26a.

- Qwest claims in its suit against Portland, Oregon that the requirement to provide maps, in a format designated by the city, identifying the location of

Qwest's facilities in public streets is an unlawful prohibition of service. *See* Qwest Memorandum at 10. Qwest and its predecessors had, for decades, complied without objection to the requirement to provide maps.

- In Cheyenne, Wyoming, Qwest has objected to providing maps of its facilitities in the rights-of-way. Again, Qwest had previously complied with this requirement without objection.

2. The Ninth Circuit also found that requiring a carrier to "undergo an extensive application process," including providing information about its technical qualifications, did not constitute right-of-way management. Pet. App. 29a-30a. One of the ordinance provisions struck down by *Auburn* provides that in order to show that it is "technically qualified," a carrier must demonstrate "that it has experience or resources to ensure that work is to be performed adequately, and can respond to emergencies during and after construction is complete."[8]

Many jurisdictions have found that requiring facility maps and a demonstration of technical qualifications is critical to ensuring that public streets and sidewalks are safe, both for the entities that place facilities in those rights-of-way and for members of the general public who daily walk or drive on them. The requirements also are necessary to coordinate use of public rights-of-way and balance the competing interests of multiple users.

- In June and July, 1999, in Flower Mound, Texas, installation crews for a telecommunications company cut

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[8] *See* Tacoma Municipal Code, Chapter 16.02.1.1.4, Pet. App. 101a-102a.

through two water lines and three gas lines in the span of several weeks.[9]

- In July 1999 in Irving, Texas, a subcontractor doing construction for a telecommunications company hit one of the city's two main water supply lines and disrupted the community's water supply for a week.[10]
- In September 2000, a subcontractor for the same telecommunications company struck a water main in downtown Dallas, flooding several buildings in the heart of the city and forcing the evacuation of 800 workers and residents.[11]
- In December 1998 in St. Cloud, Minnesota, a construction crew for a communications company ruptured a gas line and caused a building to explode. Four people were killed, others were injured, and several buildings were destroyed. The National Transportation Safety Board (NTSB) found that a probable cause was lack of adequate procedures to prevent damage to nearby utilities.[12] In the six months after the incident, St. Cloud experienced additional incidents of ruptured or damaged gas lines as a result of construction in public rights-of-way. In response, St. Cloud adopted a safety plan that requires all companies placing facilities in public rights-of-way to satisfy specified training requirements. Other communities in Minnesota have adopted similar requirements.

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[9] Jason Lamers, *Latest Gas Line Break Adds to Woes*, Dallas Morning News Insert, Summer 1999 at 1A.

[10] Rachel Horton, *City Urges Water Conservation After Water Line Slashed*, Irving News, July 11-14, 1999 at A1.

[11] Ian McCann & Steve Quinn, *Water Mains Flood Downtown*, Dallas Morning News, Sept. 5, 2000 at A1.

[12] NTSB, *Pipeline Accident Report*, NTSB Number PAR-00/01. The report is available at www.ntsb.gov/Publictn/2000/PARA0001.htm.

The increased use of city streets by telecommunications providers increases the risk that someone digging in the streets will disrupt existing facilities. Amici believe that requiring maps showing where facilities are located, and requiring assurances that the construction will be performed in a safe and reliable manner or requesting information about past construction problems are consistent with prudent right-of-way management. In any event, such requirements cannot reasonably be found to effectively prohibit the provision of service.

The language of the *Auburn* decision is throwing these and other local requirements into question. Clarifying the scope of local authority under section 253 will reduce the need for communities to forego requirements that they believe are necessary to ensure safe streets, or to defend these policies in court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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